March 23, 2020

Design and Construction issues for Architectural services arising from COVID-19

Design and Construction issues arising from the COVID-19 virus are impacting Architectural services and this is to provide ideas on how to deal with those issues.

First and foremost, you should read both your contract with the Owner and the General Conditions of the Contract for Construction, if the Project is in the Construction Phase. References are made below to sections in the AIA standard form agreements, but your agreements may be different. Section references are to the B101-2017 unless stated otherwise. References to the A201 are to the A201-2017.

**Impacts during the Design phase are already occurring.** While most architects are adept with online communications, it is time to ramp up online communication with your Consultants and the Owner for coordination of the design. Architects, Consultants and Surveyors are currently reluctant to travel to selected locations, and that will slow project progress. Slack,¹ Zoom,² Skype,³ Microsoft Teams, and Google Hangouts are just some options for communications about design coordination and to supplement field observation in the short term. However, digital platforms are slowing due to heavy use.⁴

**Delays are also occurring during the Construction phase.** Contractors are reporting shortages of materials, shortages of craft workers, and delays in governmental approvals and inspections.⁵ Contractors will be pushing with urgency for review of Pay Applications (cash flow is their life blood), but design professionals are halting travel to jobsites for construction observation, which delays observations for pay applications, RFI’s, and for the normal OAC meetings. Similarly, some testing and inspections firms are likely not going to jobsites. Accordingly, Contractors are already issuing delay notices to Owners.

Fortunately, the Governor’s March 22, 2020 “Additional Illustrative Examples of Critical Infrastructure” clarifies that the COVID-19 Statewide Stay at Home Order does not prohibit construction activities on public or private works projects. That order regards “Construction” as Essential Infrastructure, and Critical Trades include building and construction tradesmen. However, some states and cities have halted construction at least for two weeks. Even the California “stay at home” order does not pertain to current construction projects.⁶

¹ https://slack.com/.
² https://zoom.us/meetings.
⁵ AGC webinar.
Architects should put the Owner on notice that the project may be delayed and that additional services may be required. The Architect is contractually obligated to “perform its services...as expeditiously as is consistent with” the standard of care (§2.2), but there should be a conversation with the Owner that there may be delays in the Owner’s anticipated design and construction milestones (§1.1.4). Additionally, the schedule for performance of the Architect’s Services shall not be exceeded by the Architect or Owner “except for reasonable cause” (§3.1.3) and the impact of the coronavirus or COVID-19 and both governmental and private industry reaction to the virus is certainly reasonable cause. The standard time for most activities in the AIA scheme is “reasonable promptness,” which obviously is a fluid time frame, but appropriate under these circumstances.\(^7\)

Additionally, travel restrictions and social distancing limit the ability of the Architect to attend Project meetings and communicate with members of the Project team (§3.1.1). Government approvals will likely be delayed (§§3.1.5 and 3.1.6) and government inspections will be delayed. This is likely the time to discuss with the Owner “reasonable contingencies” in the project time and budget (§5.2). Evaluation of the Work will be limited. Under §3.6.2, the Architect “shall visit the site” and those site visits form the basis for both evaluations of the Work and review of Pay Applications (§3.6.3.1). If you or your Consultants are unable or unwilling to “visit the site”, the Work grinds to a halt.

At an appropriate time, the Architect should consider putting the Owner on notice of the need for Additional Services (§4.2). The Owner-Architect agreement does not expressly recognize disaster contingencies, but it does recognize the need for Additional Services “necessitated by the enactment or revision of codes, laws, or regulations” (§4.2.1). The Governor’s Proclamations are statutorily recognized and will likely be considered “regulations” that impact design and construction.

But don’t scare the Owner unnecessarily. There are preliminary reports that OSHA considers construction workers to be a “Lower Exposure Risk,” which means construction projects may be less likely to be shut down in the coming days. The Association of General Contractors is actively engaging Congress to protect construction jobs and markets\(^9\) and similar efforts should be taken at the state level. (Note: see the jobsite safety comments, below). There are reports that financial firms will be working with Owners for financial help.

Perhaps the most difficult decision for the Architect will be to render judgment on the Contractor’s request for delay. Under the A201-2017, the Contractor is entitled to compensation or extension of time on account of an “emergency affecting safety of persons or property” (A201-2017, §10.4). This emergency phrase is not otherwise defined in the A201. That additional compensation or time is determined under Article 15 Claims and Disputes, and Article 7 Changes

\(^7\) That standard of care is described as services “consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under similar circumstances”(§2.2).

\(^8\) That “reasonable promptness” applies to the Architect’s decisions on performance under the Contract Documents (§3.6.2.3), reviewing Contractor submittals (§3.6.4.1), and responding to RFI’s (§3.6.4.4).

\(^9\) https://www.agc.org/coronavirus-covid-19
in the Work (A201, §10.4). In addition, the Contractor is entitled to an extension of the Contract Time for “other causes that the Contractor asserts, and the Architect determines, justify delay” (A201, §8.3). That extension is “for such reasonable time as the Architect may determine” (A201, §8.3). These vague “other causes” and “reasonable time” phrases are wide open to interpretation, meaning the Architect wields enormous power over a COVID-19 project delay. However, the Architect “will not be liable for results of...decisions rendered in good faith” if the Architect endeavors “to secure faithful performance by both the Owner and the Contractor” and does “not show partiality to either” (A201, §4.2.12). Perhaps the hardest question will be to determine when the delay starts and stops, but that will be developed as current events unfold.

**Termination?** Under the Governor’s current proclamations, the current “emergency” does not seem to justify termination of the construction Contract. In Article 14, Termination or Suspension of the Contract, the Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no fault of the Contractor for “[i]ssuance of an order of ...a public authority having jurisdiction that requires all Work to be stopped”. The current order from the Governor does not require all work to be stopped. Similarly, the Contractor may terminate the Contract based on “[a]n act of government, such as a declaration of national emergency, that requires all Work to be stopped” (A201, §14.1.1.2). While there is a declaration of a national emergency, the “guidance” from the federal government, relied upon by the Governor’s current order, also does not require the stopping of construction work. ¹⁰ That same guidance also says State and local governments are ultimately in charge of this response and that the “guidance” should not be considered a federal directive.¹¹

Remember, the **Architect is not in charge of jobsite safety** relating to the coronavirus under §3.6.1.2 (“Architect shall not have control over...or responsibility for safety precautions...in connection with the Work”). While it is appropriate to be compassionate for workers on the jobsite, these safety issues are not architectural issues and you are not trained to address those issues. Contractor organizations like the Association of General Contractors are doing an excellent job of educating contractors on jobsite safety from the Department of Labor and OSHA and other resources.¹² Nevertheless, if you become aware of an issue that any reasonable person would consider dangerous, you must speak up, because the Architect have a duty to notify the Contractor and the Owner, and potentially, the authority having jurisdiction, of such issues. We will continue to report on these issues as they develop.

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¹¹ *Id.* at p. 2.